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February 16, 2010

Via Hand Delivery

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: *Petition of the Ad Hoc Coalition of International Telecommunications
Companies for Rulemaking to Address Inequities in USAC's Interpretation
and Application of the Carrier's Carrier Rule***

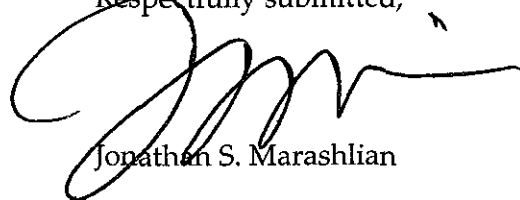
Dear Ms. Dortch:

Transmitted herewith is a Petition of the Ad Hoc Coalition of International Telecommunications Companies for Rulemaking to Address Inequities in USAC's Interpretation and Application of the Carrier's Carrier Rule. An original plus nine (9) copies are enclosed.

An additional copy of this filing is also enclosed. Please date-stamp the copy and return in the postage-prepaid envelope provided.

Should there be any questions regarding this matter, kindly contact the undersigned.

Respectfully submitted,



Jonathan S. Marashlian

Enclosures

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

)
In The Matter of The Ad Hoc Coalition)
of International Telecommunications)
Companies Petition For Rulemaking)
To Address Inequities in USAC's)
Interpretation and Application of the)
Carrier's Carrier Rule)

**PETITION OF THE AD HOC COALITION OF INTERNATIONAL
TELECOMMUNICATIONS COMPANIES FOR RULEMAKING TO ADDRESS
INEQUITIES IN USAC'S INTERPRETATION AND APPLICATION OF THE
CARRIER'S CARRIER RULE**

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February 16, 2010

I. Introduction

The Ad Hoc Coalition of International Telecommunications Companies ("Coalition")(www.telecomcoalition.com) submits this petition on behalf of its members.¹ The Coalition hereby requests that the Federal Communications Commission ("FCC" or "Commission") direct the Universal Service Administrative Company ("USAC") to suspend all pending and future enforcement of the Carrier's Carrier Rule ("CCR"), as interpreted by USAC and embodied in its Form 499-A Instructions ("Instructions"). Concurrent with the suspension of the CCR, the Coalition requests that the Commission open a rulemaking proceeding to evaluate the variety of deficiencies associated with the CCR which have previously been identified by a wide swath of industry participants. Importantly, within the context of an open and inviting rulemaking proceeding, the Coalition pleads with the Commission to develop a simple, uniform, and easily administered carrier-to-carrier USF exemption process, inclusive of a standard USF Exemption Certification Form.

II. USAC's Interpretation of the CCR Has Resulted in Countless Appeals, Unnecessary Disputes and Hardship

A. Issues Raised in Pending Appeals Impact the Entire Industry and Warrant Consideration in the Rulemaking Context

In creating the CCR, the FCC's stated purpose was to avoid duplicate USF contributions by multiple providers up and down the supply chain. In the hands of USAC, however, the CCR morphed into a rigid enforcement tool for ensuring that, to the extent USF contributions apply

¹ The Ad Hoc Coalition of International Telecommunications Companies ("ACITC") is a grassroots organization comprised of both U.S. and non-U.S. corporations, including prepaid calling card providers, international transport carriers, and a broad spectrum of entities engaged in the provision of wholesale communications services.

to the revenue at issue, at least one entity in the supply chain pays the applicable contribution. And in the hands of the marketplace, the CCR has now devolved into a lever which, at times, has been used to extract excess fees and charges by abusive suppliers. Although the evolution of the CCR into a marketplace self-enforcement mechanism is an understandable objective, there are grave problems in the way this evolution occurred. Moreover, as evidenced by the sheer number and variety of pending appeals and legal disputes, USAC's misinterpretation and misapplication of the Rule has led to industry-wide confusion and assessment of USF contributions where none are due or owing.

Several providers have appealed USAC decisions or petitioned for reform of the CCR. Their requests remain pending before the Commission. For example, IDT Corporation and IDT Telecom ("IDT") filed a petition for review of a USAC audit, specifically challenging USAC's findings relating to its reporting of carrier's carrier revenues.² IDT argued that because its reseller customers did not consume the services they purchased from IDT, attempts to assess USF fees upon IDT's carrier's carrier revenues from these sales were improper.³ IDT attacked USAC's Instructions assessing USF fees on carrier's carrier revenues as invalid because they were adopted in violation of the requirements of the Administrative Procedures Act ("APA").⁴

Similarly, in 2007, Global Crossing Bandwidth, Inc. ("Global Crossing") sought review of a USAC audit directing the company to reclassify as end-user revenues, revenues it reported

² *In the Matter of Request for Review of Decision by the Universal Service Administrative Company by IDT Corporation*, Request for Review of Decision by the Universal Service Administrative Company by IDT Corporation and IDT Telecom, WC Docket No. 96-45 (filed June 30, 2008) ("IDT Petition").

³ IDT Petition at 10-11.

⁴ *Id.* IDT's petition related back to its previously filed petition still pending before the FCC in which IDT expressed the same concerns. *In the Matter of Request for Review of Decision of the Universal Service Administrator by IDT Corporation*, Request for Review of Decision of the Universal Service Administrator by IDT Corporation, WC Docket No. 96-45, USAC Audit Report CR2005CP005 (filed Apr. 10, 2006).

as non-assessable resale revenues.⁵ Global Crossing argued that even if it failed to make a reasonable determination as to whether its resale customers were expected to contribute directly to the Fund, the proper remedy required the Commission to seek redress with the non-contributing end-users.⁶ In other words, Global Crossing did not operate as an insurer of its resale carriers' contributions.⁷ Grande Communications Networks, LLC ("Grande") recently requested review of a USAC audit, qualifying its experiences with the CCR as consistent with Global Crossing and IDT's.⁸

The Coalition's members likewise face similar problems relating to USAC's "concept" of the CCR and, more importantly, with the implementation of this flawed concept by a variety of wholesale providers. Yet, petitioners and Coalition members are not the only providers negatively affected by USAC's misinterpretation and misapplication of the CCR. The issues raised by petitioners, and further identified in the Coalition's first and second petitions for declaratory rulings, affect all industry participants. Thus, regardless of the manner in which the Commission chooses to resolve these appeals, the Commission should take steps to avoid these types of appeals in the future, by defining the specific parameters of the CCR through a formal rulemaking process, rather than continuing to give deference to USAC in such matters.

⁵ Request for Review of Decision of the Universal Service Administrative Company by Global Crossing Bandwidth, Inc., CC Docket No. 96-45 (filed June 22, 2007) ("GX Request").

⁶ GX Request at 2, 9-17.

⁷ Inexplicably, the Commission rejected this position in a recent order, sanctioning USAC's determination that Global Crossing's evidence failed to sufficiently demonstrate that it had a reasonable expectation that its customers would contribute directly. The Commission also rejected Global Crossing's admonishment of USAC for violating the APA by adopting a new rule without the requisite notice and period for public comment. See *In the Matter of Federal-State Joint Board on Universal Service, Request for Review of Decision by the Universal Service Administrator by Global Crossing Bandwidth, Inc.*, CC Docket No. 96-45, Order, DA 09-1821 (rel. Aug. 17, 2009) ("Global Crossing Order").

⁸ *In the Matter of Grande Communications Networks, LLC, Request for Review of Decision of the Universal Service Administrator*, Request for Review, WC Docket 06-122 at 27 (Dec. 28, 2009).

B. Resolving CCR Inconsistencies Will Alleviate Unnecessary Carrier Disputes

USAC relies on wholesale carriers to evaluate whether their resale carrier customers are reasonably expected to contribute directly to the USF. However, the FCC has failed to clarify wholesale providers' specific obligations with regard to identifying the resale status of their reseller customers or verifying their revenues. Further, wholesale carriers' specific responsibilities and liability to act as insurers for their resale customers remains subject to debate. In short, USAC's Instructions are subject to interpretation which has caused confusion for both wholesalers and retailers. And, this confusion has led to varying disputes between carriers as to the proper application of USAC's Instructions to carrier's carrier revenues.

The Instructions confuse wholesale providers because, while the FCC has clarified that they constitute mere "guidelines," USAC has rejected wholesalers' application of the "guidelines."⁹ For example, as discussed above, in Global Crossing's audit, USAC rejected Global Crossing's reliance on factors not enumerated in USAC's Instructions and documentation it deemed insufficient to meet its requirements.¹⁰

And, retailers likewise face confusion due to wholesalers' differing and contradictory application of the "guidelines" and the underlying CCR. For example, USAC's Instructions have confused the industry regarding wholesale suppliers' obligations to honor FCC exemptions. Underlying carriers have blindly relied upon USAC's literal Instructions to determine whether a carrier contributes directly without further considering whether the carrier qualifies for exemptions from contribution under the FCC's rules. Recently, Azultel, Inc.

⁹ Global Crossing Order at paras. 13-14.

¹⁰ *Id.*

("Azultel") filed an informal complaint with the FCC disputing its underlying carrier, Global Crossing's, application of USAC's Instructions.¹¹ Azultel explained that USAC's Instructions allow wholesalers to visit the FCC's website which lists each 499 filer and the contributor status assigned by USAC based on that filer's Form 499 submissions.¹² It argued, however, that this cursory review fails to account for applicable exemptions.¹³

Rather than considering all available information, Global Crossing made assumptions about Azultel's liability based solely upon the FCC's identification of Azultel's status as a non-contributor.¹⁴ Global Crossing therefore passed through USF obligations to Azultel without applying exemptions applicable under the FCC's rules.¹⁵ Azultel charged that it is no less inequitable or discriminatory to overburden certain carriers through pass-through charges than via direct contribution assessments.¹⁶ In other words, the FCC's rules and regulations exempting certain carriers extend to pass-through charges. That is, an exemption applicable to direct providers, such as *de minimis*, likewise operates to limit a reseller's pass-through charges.

Yet, USAC's Instructions fail to clarify these principles. Notably, while Azultel filed its complaint against Global Crossing for its interpretation of USAC's Instructions which led to inequitable pass-through charges, Global Crossing aptly described the dispute as in fact a

¹¹ See Azultel, Inc., *Informal Complaint Seeking FCC Order Barring Global Crossing From Imposing and Collecting Unreasonable and Discriminatory USF and Cost Recovery Fee Pass-through Surcharges* (filed Aug. 10, 2009) ("Azultel Complaint"), attached hereto as Exhibit A.

¹² Azultel Complaint at 5.

¹³ *Id.* at 5-6.

¹⁴ *Id.* at 5-6, 10.

¹⁵ Azultel qualified as a *de minimis* carrier.

¹⁶ Azultel Complaint at 5.

complaint against USAC.¹⁷ Further, Global Crossing agreed that Azultel's complaint has merit and identifies "significant issues" with the Commission's administration of the Fund.¹⁸

The ambiguity of USAC's Instructions and the FCC's failure to provide guidance on the application of its rules to pass-through charges have led wholesale carriers to misconstrue and misapply the Commission's rules. Global Crossing is not the only carrier that has so construed USAC's Instructions in contradiction to FCC rules, triggering carrier-to-carrier disputes. The Commission must act to prevent further misapprehension of its Rules and the assessment of unlawful, discriminatory and inequitable USF fees.

Other industry participants have recognized this problem and sought Commission reform. For example, commenters supporting the Coalition's First Petition for Declaratory Ruling ("First Petition") raised the issue. Ambess Enterprises, Inc. agreed with the Coalition's assessment of the marketplace consequences of ill-conceived USAC Instructions, observing that resellers are "at the mercy" of their wholesale suppliers because their suppliers decide whether and how to pass through USF fees based on *their* interpretations of the Instructions.¹⁹ The Coalition agrees that the existing system places *de minimis* reseller customers at a severe competitive disadvantage and encourages misrepresentation and other unfair practices by

¹⁷ See Letter from Michael J. Shortley III to Tracy Bridgham, *re: Azultel, Inc. v. Global Crossing Telecommunications, Inc.*, EB-09-MDIC-0027 (Nov. 2, 2009) ("Azultel's complaint is more properly directed toward the Commission's administration of the fund rather than Global Crossing's compliance with the Form 499-A instructions"), attached hereto as Exhibit B.

¹⁸ *Id.*

¹⁹ *In the Matter of the Ad Hoc Coalition of International Telecommunications Companies' Petition for Declaratory Ruling Regarding Universal Service Fund Contributions ("In re Coalition")*, Comments of Ambess Enterprises, Inc. ("Ambess") at 11. Ambess also argues that this system places resellers at a competitive disadvantage by allowing wholesalers to take advantage of the Limited International Revenue Exemption ("LIRE") with respect to their reporting, without any controls to ensure the fair and equitable pass-through of savings to their *de minimis* reseller customers. *Id.* at 11-12.

wholesale suppliers. To avoid being taken advantage of by marketplace forces, the Coalition implores the Commission to commence a rulemaking proceeding considering these issues, culminating in the adoption of USF reform measures.

For example, the Commission could clarify wholesale providers' responsibilities to their resale customers, including the recognition and application of valid exemptions in the assessment of pass-through fees.²⁰ As further discussed below, the Commission could adopt a standardized process for wholesalers' review of resellers' pass-through liability and publish standard forms for revenue validation.

III. Standardization of the USF Exemption Certification Process is Required

Wholesale carriers traditionally rely, at least partially, upon exemption forms completed by their reseller customers to determine their pass-through USF obligations. Because wholesale carriers rely upon their own varying interpretations of USAC's Instructions for compliance with the CCR, they have created widely disparate exemption forms. The dissimilarity in forms breeds chaos and confusion. Understanding these forms, much less coherently completing them, has caused extensive confusion among resale carriers. For example, some forms simply demand that a reseller identify itself as a direct contributor or a non-contributor without explanation. Others offer the opportunity for a carrier to identify itself as a non-contributor and to explain why it is not required to contribute or to otherwise support universal service

²⁰ Additionally, the FCC could allow wholesalers to permit their *de minimis* reseller customers to elect to take direct contributor status of their certification forms. See *In re Coalition*, Petition of the Ad Hoc Coalition of International Telecommunications Companies for Declaratory Rulings that: (1) Qualifying Downstream Carriers May Choose Either to Accept Supplier Pass-through Surcharges or Pay Universal Service Fees Directly; and (2) Prepaid Calling Card Providers' Distributor Revenues are Not "End-user" Revenues and Allowing Reporting of Actual Receipts Only, or in the Alternative, to Initiate a Rulemaking to Address these Issues (filed Feb. 12, 2009) ("First Petition").

mechanisms. Yet others only request that the carrier certify that it is purchasing services for resale and that its customers file Forms 499-A and contribute directly to the USF.

With so many various requirements, it is obvious that no carrier can clearly comprehend the implications of checking assorted boxes on exemption forms. Some wholesale carriers have even arguably abused the process, taking advantage of USAC's Instructions to secure unfair competitive advantages. For example, carriers have requested that their resale customers divulge customer lists in the guise of requiring confirmation of their contribution to the USF.

The forms present further complications for international service providers. For example, some wholesale carriers demand that a reseller classify its international service based upon the origination and termination of its services. This, however, is no easy task. And, non-U.S. entities that are not subject to U.S. jurisdiction are concerned that misqualifying their services could subject them to incorrect pass-through fees. While many exemption forms of the past clearly exempted non-U.S. entities, this category has inexplicably disappeared from various current exemption forms, leaving non-U.S. international service providers at a loss as to how to complete the forms honestly and accurately, while still maintaining their exemption from pass-through fees.

And, even if resale carriers completing the forms believe they understand the meaning of the certifications they have made, it is impossible for them to anticipate how their wholesale suppliers will interpret the forms. Wholesalers use different language to describe resellers' activities and may interpret key phrases to conclusively determine pass-through liabilities. Because the forms are certifications, they often demand that the reseller warrant that if any of the information provided is false, it may be responsible for fees and penalties. Yet, these

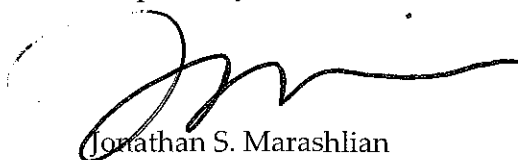
warranties do not require that the falsifications be willful, merely that they be included in the forms. Thus, carriers may be subject to penalties for completing forms they believed truthful that are found inaccurate by virtue of their wholesalers' interpretations of the terms and application of USAC's CCR Instructions.

The FCC could have avoided many of the problems currently afflicting the industry by initiating a rulemaking proceeding upon the adoption of the CCR. Instead, the Commission has deferred compliance with the Rule to its USF administrator, USAC, leading to piecemeal application of the CCR. In order to alleviate pending and future disputes that ultimately harm the public due to the duplicate imposition of pass-through fees, the Commission should adopt and publish uniform rules in the Code of Federal Regulations and a standard Exemption Form to assist carriers with the USF exemption certification process.

IV. Conclusion

For the foregoing reasons, the Coalition respectfully requests that the Commission suspend all pending and future enforcement of the CCR as interpreted by USAC and embodied in its Form 499-A Instructions and initiate a rulemaking proceeding to address USAC's interpretation and application of the CCR. In light of various pending petitions and appeals, the Commission faces a choice. It can either address the issues raised in each of these separate requests, or it can take the simpler approach- initiate a rulemaking to address all of the various issues. In addition to simplicity, a rulemaking proceeding presents the Commission with the opportunity to adopt a standard process and standardized forms for validating revenues. The Commission should take advantage of this unique opportunity to clarify an array of concerns relating to the application of the CCR.

Respectfully submitted,



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February 16, 2010

EXHIBIT A: Informal Complaint of Azultel, Inc. against Global Crossing Telecommunications, Inc. and Erratum*

***Note: The exhibits to Azultel's Complaint have been excluded because they are voluminous.**



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August 10, 2009

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., S.W., TW-A325
Washington, DC 20554

Re: *Informal Complaint Seeking FCC Order Barring Global Crossing from Imposing and Collecting Unreasonable and Discriminatory USF and Cost Recovery Fee Pass-through Surcharges*

Dear Ms. Dortch:

Azultel, Inc. ("Azultel" or "Complainant") hereby files this Informal Complaint against Global Crossing Telecommunications, Inc. ("Global Crossing" or "Defendant"), pursuant to Section 208 of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 208, and Section 1.716 of the Federal Communications Commission's ("FCC" or "Commission") rules.

I. Complainant's Contact Information

Complainant is a toll telecommunications services resale carrier, reselling primarily international voice communications services. Over 99% of Azultel's customer traffic is international, with the remaining 1% comprised of domestic traffic. Complainant originates and terminates telecommunications traffic through its switch, located in Miami, Florida. Azultel purchases wholesale inbound and outbound telecommunications capacity from Global Crossing.

Complainant's name, address and phone number are as follows:

Azultel, Inc.
2200 S. Dixie Hwy.
Suite 506

Miami, FL 33133
Phone: 786-497-4050
Fax: 786-497-4057

All contact with Complainant should be through its undersigned counsel.

II. Defendant's Contact Information

Michael Shortly, III
Global Crossing Telecommunications, Inc.
180 South Clinton Ave.
Rochester, NY 14646
Fax: (877) 774-7302
michael.shortly@globalcrossing.com

III. Statement of Facts

In contravention of FCC regulations and federal court precedent, and in violation of Sections 201(b) and 254 of the Telecommunications Act, Global Crossing imposes unreasonable, discriminatory, and unlawful pass-through Universal Service Fund and Cost Recovery Fee surcharges upon Azutel. By this informal complaint, Azutel seeks all appropriate relief necessary to prevent Global Crossing's efforts to collect such unlawful surcharges, to the extent billed to date, and stop Global Crossing from imposing such surcharges in the future.

A. Regulatory Background

1. The Universal Service Fund

The Telecommunications Act of 1996 announced that "[a]ll providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service."¹ Most carriers pay contributions to the Universal Service Fund ("USF") based on a percentage of their interstate and international end-user revenues.² The FCC sets this percentage, known as the contribution factor, each quarter.

To reduce burdens on small providers, the FCC exempted "de minimis" providers from USF contributions and certain report filing requirements (such as quarterly reporting on Form 499-Q).³ Specifically, the Commission's rules provide:

¹ 47 U.S.C. § 254(d).

² 47 C.F.R. § 54.706(b); 47 C.F.R. § 54.709(a).

³ 47 C.F.R. § 54.708.

"If a contributor's contribution to universal service in any given year is less than \$10,000 that contributor will not be required to submit a contribution or Telecommunications Reporting Worksheet for that year unless it is required to do so by our rules governing Telecommunications Relay Service."⁴

Also, to ensure equitable and non-discriminatory contributions in compliance with the Fifth Circuit Court of Appeals' ("5th Circuit") decision in *Texas Office of the Public Utility Counsel v. FCC* ("TOPUC")⁵, the FCC established the Limited International Revenue Exemption ("LIRE"). LIRE limits USF contribution burdens on carriers whose interstate end-user revenues amount to less than twelve percent of their combined interstate and international end-user revenues by allowing them to contribute based solely upon their interstate revenues reported in Form 499-A, the FCC's annual telecommunications revenue reporting worksheet.⁶

The Universal Service Administrative Company ("USAC") administers the USF, acting as the FCC's collection agent. As such, USAC occupies a purely administrative position and may not make policy or interpret FCC rules.⁷ In this role, USAC collects annual and quarterly revenue information via FCC Forms 499-A and 499-Q, respectively. USAC also issues instructions to assist Form 499 filers in completing the FCC worksheets. These instructions are merely advisory and do not trump FCC regulations; wherefore, only FCC regulations may provide the specific manner of contribution or govern USAC's collection of fees.

2. The Carrier's Carrier Rule and Classifying Resellers

The 2009 Form 499-A states that "[i]n general, contributions are calculated based on contributors' end-user telecommunications revenue information."⁸ (emphasis added). However, according to USAC's instructions, wholesale providers of telecommunications are asked to treat all non-contributors, including exempt resellers, as end-users for the purpose of calculating their USF liability. The instructions state "some carriers may be exempt from

⁴ *Id.*

⁵ 183 F.3d 393, 434-35 (5th Cir. 1999).

⁶ 47 C.F.R. § 54.706(c). Contributing carriers are required to report projected revenues quarterly via FCC Form 499-Q and actual revenues post-receipt annually via FCC Form 499-A.

⁷ USAC is prohibited from "mak[ing] policy, interpret[ing] unclear provisions of the statute or rules, or interpret[ing] the intent of Congress." 47 C.F.R. § 54.702(c). "Where the [provisions of the Telecommunications Act] or the [FCC's] rules are unclear, or do not address a particular situation, [USAC must] seek guidance from the [FCC]." *Id.* The FCC retains the authority to overrule USAC's actions in administering the universal service support funds; those who are aggrieved by USAC, its committees, or its Board may seek review from the FCC. *Id.* § 54.719(c).

⁸ *Instructions to Telecommunications Reporting Worksheet, FCC Form 499-A*, available at <http://www.fcc.gov/Forms/Form499-A/499a-2009.pdf> at 4 ("Instructions").

⁷ Instructions at 5.

⁸ Instructions at 4.

contributing directly to the universal service support mechanisms...These contributors must be treated as end users by their underlying carriers."⁹ Further, "[s]ales to *de minimis* resellers... and any other non-contributors are treated as end-user revenues."¹⁰

Known as the "Carrier's Carrier Rule" ("CCR"), this restriction of contributions to end-user revenues is intended to prevent duplicative USF contributions at the wholesale and retail levels.¹¹ It exempts wholesalers from contribution when their reseller customers contribute directly. Under the rule, underlying carriers must determine whether their downstream reseller customers contribute directly to the USF.

3. Implications of Classification as a USF Contributor or Non-Contributor

A wholesale carrier's qualification of its reseller customer as either a USF contributor or non-contributor determines the reseller's USF obligations. A reseller customer identified as a direct contributor is exempt from additional indirect or "pass-through" charges. A non-contributing reseller, however, may indirectly be responsible for USF pass-throughs. This results from the FCC's rules allowing a wholesale carrier to shift its USF burden to its non-contributing resale carrier customers.

The FCC recognizes that, by virtue of the CCR, exempt carriers may be responsible for pass-through charges assessed by their underlying carriers.¹² Since USF fees derive from end-user revenues, carriers are entitled to pass their obligations along to end-user customers.¹³ Therefore, end-users, including exempt resellers classified as end-users by virtue of the CCR, are often ultimately responsible for the USF burden of underlying carriers. Thus, rather than complete exemption, a non-contributing downstream carrier must pay pass-through charges if its underlying carrier elects to shift its USF burden. Thus, a wholesaler's classification of its reseller customer as either a non-contributor or a contributor has significant consequences.

4. Direct and Indirect Assessments Must Comport with FCC Rules

⁹ Instructions at 5.

¹⁰ Telecommunications Industry Revenues 2005, Industry Analysis & Technology Division, Wireline Competition Bureau, June 13, 2007 at *28.

¹¹ See, e.g., *Vonage Holdings Corp. v. FCC*, 376 U.S. App. D.C. 396, 401 (2007).

¹² "[S]ome carriers may be exempt from contributing directly to the universal service support mechanisms (e.g., because they are *de minimis*)...These non-contributors must be treated as end users by their underlying carriers and, therefore, may end up contributing indirectly as a result of pass-through charges." Instructions at 5.

¹³ See USAC website, "Each company makes a business decision about whether and how to assess customers to recover its Universal Service Fund costs.", <http://www.usac.org/about/universal-service/purpose-of-fund/>; 47 C.F.R. § 54.712.

The FCC's rules conclusively prohibit unreasonable practices and discriminatory and inequitable USF fees. Further, court precedent restricts the assessment of USF charges upon international providers. Neither the FCC's rules nor the courts differentiate between direct and indirect contributions. In other words, both direct and indirect contributions must be equitable, non-discriminatory and reasonable.

As discussed, the FCC adopted the de minimis and LIRE exemptions in order to comply with its responsibility to ensure an equitable and non-discriminatory USF. It is no less inequitable or discriminatory to overburden certain carriers through pass-through charges than via direct contribution assessments. In other words, the FCC's rules and regulations exempting certain carriers extend to pass-through charges. That is, an exemption applicable to direct providers, such as de minimis, likewise operates to limit a reseller's pass-through charges. A wholesale carrier charged with compliance with the CCR must recognize and incorporate these principles when calculating pass-through fees.

5. Obligations Under the Carrier's Carrier Rule

To determine a reseller carrier's status as a USF contributor or non-contributor (and to properly identify applicable exemptions), wholesale carriers must conduct due diligence and thoroughly review all available information relevant to a carrier's classification. Based upon information gathered, wholesalers must classify their reseller customers as non-contributors or contributors. Thereafter, wholesale carriers must take account of any additional information that may affect a reseller customer's obligations under the FCC's rules. In other words, a wholesale carrier's due diligence obligation extends beyond its responsibility to identify a carrier as a contributor or non-contributor. After making this classification, the wholesale carrier must consider additional information relevant to the carrier's status and the calculation of any applicable pass-through fees.

To determine whether a reseller is a direct contributor, wholesale carriers may visit the FCC's website which lists each 499 filer and the contributor status assigned by USAC based on that filer's Form 499 submissions. This determination, however, does not end a wholesale carrier's inquiry. Instead, should a wholesale carrier decide to pass through USF fees imposed by USAC to its reseller customers, it must also ensure full compliance with FCC rules in calculating pass-through charges. Specifically, the FCC rules require that the wholesaler consider *all* reasonably available information when calculating the relevant charges to be assessed of a particular carrier. As such, a carrier breaches its fiduciary duties to its reseller customers when it ignores reasonably available information.

In other words, while wholesale carriers may use the FCC's website as a source for identifying a carrier's status as a contributor or non-contributor, it may not make assumptions about the carrier or its USF obligations based solely upon this information. It is obligated to conduct further research to ensure full compliance with FCC rules - especially where a reseller carrier offers information evidencing its entitlement to exemption from certain pass-through

charges.¹⁴ It would be the height of unreasonableness for a wholesale provider to avoid its duty to conduct a diligent evaluation of each customer's claimed exemption from pass-through surcharges, and limit its review to classification of the customer's status as a contributor or non-contributor. Nothing excuses a wholesaler's blind reliance on the information on the FCC's website.

6. Failure to Consider Evidence of Exemption or Direct Contribution is Patently Unreasonable, Discriminatory, Inequitable and Violates Court Precedent

A wholesale carrier presented with evidence of an exemption must thoroughly consider this information in calculating pass-through charges.¹⁵ In addition to breaching its fiduciary duties to its reseller customers under the CCR, a wholesaler's failure to consider this information is patently unreasonable and results in discriminatory and inequitable USF fees in violation of FCC rules, and contradicting court precedent limiting fees on international carriers.

First, Section 201(b) of the Act mandates that all FCC-regulated telecommunications carriers operate justly and reasonably in the provision of communications services.¹⁶ A stringent policy relying entirely on the FCC's website to determine a reseller customer's USF obligations is plainly unreasonable. A wholesale carrier must conduct diligent research to determine a reseller customer's potential pass-through obligations. Rigid adherence to a policy that takes account only of the carrier's status as either a contributor or non-contributor directly contravenes FCC rules, and a wholesale carrier's obligations under the CCR. Likewise, ignoring evidence demonstrating a reseller carrier's entitlement to reduced pass-through charges by

¹⁴ In order to avoid inequitable and discriminatory USF fees resulting from miscalculated pass-through charges, as identified above, reseller carriers may contribute directly to the Fund. Nothing in the FCC's rules or USAC's instructions currently prohibits a de minimis carrier from contributing directly to the USF – whether de minimis by virtue of LIRE or otherwise. The Commission's rules merely state that no contribution will be required of a de minimis carrier. Thus, a wholesale carrier may not charge pass-through fees despite claims by its reseller customers that they intend to contribute directly to the USF. In addition to failing to reflect applicable exemptions, the FCC's website only identifies whether the carrier already contributed directly or not. It does not identify carriers who, after receiving invoices assessing discriminatory pass-through fees notify their wholesale carriers that they intend to exercise their right to contribute directly. See Petition of Ad Hoc Coalition attached hereto as Exhibit C and Reply Comments of MVS USA, Inc. attached hereto at Exhibit D.

¹⁵ Similarly, a wholesale carrier presented with confirmation of a reseller customer's direct contribution or intent to contribute directly must likewise consider this information when determining if and how much to assess in pass-through charges.

¹⁶ 47 U.S.C. § 201(b). Similarly, ignoring a resale carrier's right to contribute directly is plainly unreasonable.

virtue of applicable exemptions and failing to apply these exemptions in calculating pass-through assessments is similarly unreasonable in contravention of Section 201(b).

Second, Section 254(b)(4) requires that all contributions to universal service be equitable and nondiscriminatory.¹⁷ In enacting the de minimis and LIRE exemptions, the Commission intended to exempt small carriers with limited revenue pools from the crippling burden of USF contribution.¹⁸ Exclusive reliance on the FCC website to identify a reseller's contribution status without accounting for exemptions violates Section 254(b)(4)'s mandate. Similarly, denying a carrier the exemption rights to which it is entitled contradicts Section 254. This unsupportable practice often results in pass-through fees that greatly exceed a reseller carrier's obligation as a direct contributor. Such a result is clearly discriminatory and inequitable, thus violating FCC rules. This problem is exacerbated for a LIRE-qualifying carrier that is also de minimis. For example, a carrier whose interstate revenues amount to less than 12% of its combined interstate and international end-user revenues need only directly contribute based upon its interstate revenues. If, after application of the contribution factor to this figure, the carrier's contribution is less than \$10,000, then the carrier is also considered to be de minimis. As a direct contributor, the carrier is entirely exempt. However, a LIRE-qualifying de minimis reseller carrier's underlying carrier on occasion inappropriately treats the entirety of the reseller's revenues as contribution-eligible. Therefore, it may charge pass-through fees on both the reseller's interstate and international end-user revenues, a fee exceeding its direct contribution obligation (\$0), and possibly exceeding its direct contribution obligation under LIRE alone, ignoring the de minimis rule.¹⁹ By exempting certain carriers when they contribute directly, the FCC signaled its intent to unconditionally limit their USF burdens. Wholesale carriers who neglect to apply these exemptions when calculating pass-through charges are clearly ignoring the FCC's express will.

¹⁷ 47 U.S.C. § 254(b)(4).

¹⁸ See, e.g., *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (Report to Congress), Rel. FCC 98-67, 13 FCC Rcd. 11501, 11570-71 n. 141 (1998).

¹⁹ For further illustration, assume carrier C has \$75,000 in interstate telecommunications revenue but also \$10,000,000 in international revenues. Because carrier C's interstate revenues account for less than .75% of its combined interstate and international end-user revenues, carrier C qualifies for LIRE. Therefore, carrier C need only contribute on the basis of its \$75,000 worth of interstate revenue. Assuming a contribution factor of 10%, carrier C's USF obligation amounts to \$7,500, placing it squarely within the de minimis exemption which attaches automatically. Therefore, carrier C's underlying carrier, carrier D, must treat carrier C as an end-user and is entitled to bill pass-through charges to carrier C. However, carrier D's contribution base includes the ENTIRETY of carrier C's interstate and international end-user revenue pool. Thus, carrier D treats carrier C's \$10,075,000 in total revenues as contribution-eligible end-user revenues. Carrier D then calculates its USF liability based upon the 10% contribution factor at \$1,075,000, the entirety of which it may pass along to carrier C. Carrier C's burden has increased from \$0 (de minimis) to \$1,075,000. As a direct contributor, if carrier C declined the exemption and opted for direct contribution, its contribution would be but \$7,500, (10% of its interstate revenues of \$75,000), resulting in a 99% savings of \$1,067,500.

Third, this practice violates the precedent set forth by the 5th Circuit in *TOPUC*. In *TOPUC*, the 5th Circuit held that imposing an assessment on a carrier's international services revenue in excess of the carrier's total interstate revenue violated the equitable and non-discriminatory contribution mandates of the FCC's universal service rules.²⁰ The *TOPUC* court stated unequivocally that a USF contribution amount that exceeds a contributor's interstate revenues, *on that basis alone*, violates Section 254's requirement that carriers contribute to the USF "on an equitable and non-discriminatory basis."²¹ Thus, relying solely upon a carrier's contribution status as listed on the FCC's website and ignoring entitlement to LIRE likewise violates *TOPUC*.

B. Defendant's Demands for Payment of USF and CRF Ancillary Charges are Unreasonable, Discriminatory and in Violation of Federal Court Precedent

Global Crossing issued Azultel invoices in April, May, and June of 2009.²² Each invoice included "Ancillary Charges" consisting of "USF" and "CRF" (Cost Recovery Fee) charges. USF is a pass-through surcharge purportedly to recoup USF contributions made by Global Crossing based on revenue derived from Azultel. Likewise, CRF is presumably billed to recover Global Crossing's TRS contributions, FCC regulatory fees, NANP and LNP support payments, also based on revenue derived from Azultel.²³ For the following reasons, both of these pass-through "Ancillary Charges" are unlawful.

²⁰ *TOPUC*, 183 F.3d at 434-435.

²¹ *See id.* ("[Petitioner]'s attack boils down to the argument that it is being unfairly treated because it will be forced to pay more in universal service contributions than it can generate in interstate revenues. It makes a compelling argument that this result alone violates the equitable language of [Section 254]").

²² *See* Exhibit B.

²³ Telecommunications Relay Service ("TRS"), North American Numbering Plan Administration ("NANPA") and Local Number Portability ("LNP") are additional federal funds to which telecommunications carriers must contribute. If the presumptions about CRF are correct, Global Crossing is illegally and fraudulently billing CRF charges to Azultel, and similarly situated customers, because Azultel is paying these contributions and support payments directly, based on retail revenue reported in its Form 499-A. Moreover, even if permissible, the CRF is patently unreasonable because it is excessive. At approximately 4% of Azultel's contribution-eligible revenues, the CRF surcharge far exceeds the approximately 1.5% in combined TRS, FCC regulatory fee, NANP/LNP contribution factors authorized by the Commission for the relevant period. To the extent Global Crossing claims the remaining 2.5% is attributable to costs associated with the "administration" of its compliance with the FCC programs, absent cost data to support this figure, the Commission should declare Global Crossing's fee grossly unreasonable.

As previously discussed, it is patently inequitable and discriminatory to assess pass-through USF charges exceeding a carrier's obligations as a direct contributor. But, Global Crossing's invoices reflect pass-through fees twelve times the amount of Azutel's obligation were it to contribute directly. This unreasonable and unsupportable result stems from Global Crossing's rigid and exclusive reliance on the FCC's website to verify Azutel's USF contribution obligations. Global Crossing failed to conduct further research into Azutel's contribution liability and sternly refused to acknowledge evidence of applicable exemptions that would reduce Azutel's total USF burden. Instead, Global Crossing looked no further than the FCC's website, identified Azutel as a non-contributor and elected to pass through the entirety of its revenues derived from Azutel, clearly breaching its fiduciary duties to Azutel. Despite Azutel's status as a LIRE-qualifying de minimis carrier, Global Crossing continues to pass through USF fees on Azutel's entire revenue base - both international and domestic interstate traffic. As previously mentioned, over 99% of Azutel's customer traffic is international. Because Azutel's domestic or interstate traffic equates to less than 1% of its overall communications traffic, clearly less than the 12% threshold under LIRE, as a direct contributor, Azutel would only be liable for USF fees on the interstate portion of its revenues.

For example, on its 2009 Form 499-A, Azutel reported [REDACTED] in net interstate revenues and [REDACTED] in net international revenues.²⁴ First, because its interstate portion amounted to only .39% of its entire contribution base, Azutel qualified for LIRE. Its direct contribution, therefore, would be calculated solely from its interstate revenues. Second, because its interstate revenues totaled under \$10,000, it is also a de minimis carrier by virtue of LIRE. Since de minimis carriers are exempt from USF contributions, the combination of the two exemptions eliminates Azutel's burden in its entirety. But, ignoring the de minimis exemption and relying solely on LIRE, using an average of quarterly contribution factors, Azutel's direct contribution would amount to approximately [REDACTED]²⁵

Similarly, Global Crossing's May and June 2009 invoices to Azutel report approximately [REDACTED] and [REDACTED] in interstate revenues, respectively.²⁶ During these months, Azutel's total combined interstate and international revenues equaled approximately [REDACTED] in May and [REDACTED] in June. Because its interstate revenues amounted to less than 12% of its combined interstate and international revenues, based upon these figures, Azutel remained a LIRE-qualifying provider.²⁷ Thus, based upon its interstate revenue for these months alone, multiplied by the FCC's contribution factor (11.3%), Azutel's USF contribution obligation would amount to approximately [REDACTED] for May and [REDACTED] for June. Based on an average of

²⁴ Azutel's 2009 Form 499-A is attached hereto as Exhibit A.

²⁵ [REDACTED] = average quarterly factor (.11075) x interstate revenues ([REDACTED]).

²⁶ Global Crossing's May and June 2009 invoices are attached hereto as Exhibit B.

²⁷ May's interstate revenue represents approximately 7.5% of Azutel's combined interstate and international revenues for the month. Its June interstate revenues amount to approximately 12% of its combined interstate and international revenues. An average of the two months equates to 9.4%.

the two, over the entire year, Azutел's contribution would be around [REDACTED]. As such, Azutел remains a de minimis provider. Global Crossing, however, in the months of May and June, alone, assessed and seeks to collect from Azutел the sum of [REDACTED] in USF fees.²⁸ Global Crossing's refusal to honor Azutел's exemption from contributions on its international charges thereby results in a twelve fold increase in Azutел's overall USF contribution obligation as an "indirect" contributor vis-à-vis the amount it would likely owe as a direct contributor under FCC regulations.²⁹

On June 25, 2009, Azutел challenged Global Crossing's recent assessments as contrary to the FCC's rules.³⁰ Global Crossing retorted that because Azutел is listed as a "non-contributor" on the FCC's website, Global Crossing is justified in assessing USF fees in this manner. Global Crossing refuses to relent or consider Azutел's counterarguments which comport with the FCC's rules. Rather, Global Crossing reasons that its actions are justified because it relied upon a USAC instruction. Global Crossing's position, however, is unsupportable. Exclusive reliance on Azutел's contributor status as identified on the FCC's website falls short of Global Crossing's obligations under the CCR, breaching its duty to its resale carriers, and contravenes FCC rules.

Global Crossing has improperly interpreted USAC's instructions far too literally and conservatively and without due consideration of the overriding FCC regulations, thereby leaving Azutел at Global Crossing's mercy for imposing USF fees (and grossly excessive CRF fees). Global Crossing's policy of rigid and absolute reliance on Azutел's carrier status as identified on the FCC's website to determine its USF obligations is discriminatory, inequitable and unreasonable in violation of FCC rules. Global Crossing has improperly interpreted USAC's permissive instruction to identify a carrier's contribution obligations via the FCC's website. USAC's instructions do not limit a wholesale carrier's responsibility to fully vet a reseller's contribution status. Global Crossing, however, wrongfully assumes that USAC's instructions delineate its entire obligation under the CCR.

Instead of considering this verification tool as only one component of its responsibilities under the CCR, Global Crossing stopped short and relied exclusively on Azutел's classification as a "non-contributor." Based upon this identification, Global Crossing wrongfully assumed

²⁸ This is the sum of May and June - [REDACTED] and [REDACTED]

²⁹ Global Crossing's pass-through charges may be questionable on alternative grounds, as well. Global Crossing charged Azutел USF fees for services associated with "VoIP Internet Access." Revenue from Internet Access is not telecommunications revenue subject to USF contributions. To the extent the invoiced charges are, in fact, associated with an information service, Global Crossing lacks authority to assess and collect USF fees from Azutел based on revenue derived therefrom.

³⁰ Azutел also filed a dispute with Global Crossing in accordance with the terms of its contract with the company on June 22, 2009. Global Crossing has taken the position that the dispute has been rejected and is closed.

that it could pass the entirety of its USF obligations based upon Azutel's international and interstate revenues through without further research and consideration of additional factors affecting its contribution liability. These actions fail to fulfill Global Crossing's fiduciary duties to its resale carriers. Further, because this approach fails to take account of Azutel's rightful exemptions as provided by the FCC's rules, it contravenes FCC regulations. As discussed above, an interpretation of USAC instructions that contravenes FCC rules cannot withstand scrutiny. Global Crossing is obstructing Azutel's clear right to demonstrate its qualification for USF exemptions and to avoid discriminatory assessments.³¹

First, Global Crossing's failure to recognize Azutel's qualification for USF exemptions is an unreasonable practice in violation of Section 201(b) of the Act. Global Crossing's denial of Azutel's plain and obvious right to accept pass-throughs calculated by incorporating the exemptions for which Azutel qualifies, is unreasonable, unethical and unsupportable in violation of Section 201(b). Global Crossing refuses to deviate from its strict policy of acknowledging as a contributor's obligations, the description listed on the FCC's website, even discounting evidence to the contrary. The company hides behind USAC's Form 499-A instructions, disregarding its violations of Commission rules. While informative, USAC's instructions do not supersede FCC rules. FCC rules and regulations govern USAC instructions, and carriers must follow FCC rules, even if this results in a conflict with USAC instructions.

Second, this unreasonable policy results in discriminatory and inequitable charges in violation of Section 254 of the Act. Global Crossing's interpretation of USAC instructions penalizes Azutel, which would otherwise face minimal or no USF contribution liability. Further, it competitively disadvantages Azutel, which cannot as easily absorb substantial fees as large providers. This result directly counters the basic intent of the de minimis and LIRE exemptions.

Finally, Global Crossing's practice violates federal court precedent set out in *TOPUC* proscribing USF fees on a carrier's international revenue in excess of its total interstate revenues. Global Crossing's assessment of [REDACTED] and [REDACTED] in May and June 2009 USF fees clearly violates *TOPUC*. Not only do these pass-through assessments exceed each month's interstate revenues (ie. [REDACTED] exceeds [REDACTED] and [REDACTED] exceeds [REDACTED]), each of these assessments alone exceeds or nearly exceeds the total ([REDACTED]) that Azutel would owe for the entire year.

Neither the FCC's rules nor *TOPUC* distinguishes between direct and indirect contribution. Therefore, direct and pass-through contribution obligations must be consistent with Commission rules and the precedent established by the 5th Circuit in *TOPUC*. Global

³¹ Global Crossing is likewise preventing Azutel from exercising its right to contribute directly to the USF.


Crossing may not assess pass-through USF charges of Azutel on its international revenue that are discriminatory, inequitable or exceed its interstate revenues.³²

In short, Global Crossing has ignored evidence demonstrating Azutel's right to USF exemptions. Instead, Global Crossing relied exclusively upon the FCC's website to classify Azutel as a non-contributor to the USF. Based upon this classification, Global Crossing improperly assumed that Azutel was not entitled to USF exemptions and passed through the entirety of its USF obligations derived from Azutel's international and interstate revenues. Global Crossing breached its investigative duty to Azutel, ignoring clear evidence offered by Azutel demonstrating its entitlement to LIRE. In other words, Global Crossing unreasonably interpreted the "non-contributor" classification ascribed to Azutel via the FCC's website as tacit approval to pass through USF fees assessed on the entirety of Azutel's interstate and international revenues.

IV. Relief Requested

Complainant respectfully requests that the Commission order Global Crossing to comply with its rules regarding universal service. Specifically, Complainant asks that the Commission direct Global Crossing to cancel its previous invoices assessing pass-through charges based upon both Complainant's international and interstate revenue and to either (1) issue new invoices assessing pass-through USF charges on Complainant's international revenues only, in compliance with LIRE and TOPUC; or (2) acknowledge Complainant's right to elect direct contribution, and treat Complainant as a direct contributor after it confirms that it has directly contributed to universal service.

Respectfully submitted,



Jacqueline R. Hankins
Jonathan S. Marashlian

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The CommLaw Group
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McLean, VA 22101
Tel: 703-714-1300
Fax: 703-714-1330
jrh@commlawgroup.com

³² Further, Global Crossing may not ignore Azutel's right to elect direct contribution in lieu of accepting pass-through USF fees.

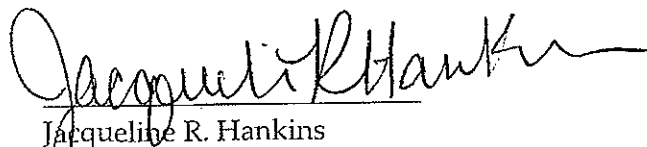
CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August, 2009, a copy of the foregoing Informal Complaint was delivered via Certified Mail to the following:

Global Crossing Telecommunications, Inc.
225 Kenneth Drive
Rochester, New York 14623
Attention: Senior Vice President
North American Carrier Services
Facsimile #: (877) 774-7302

Global Crossing Telecommunications, Inc.
225 Kenneth Drive
Rochester, New York 14623
Attention: Manager Contract Administration
Facsimile #: (877) 774-7302

Michael Shortly, III
Global Crossing Telecommunications, Inc.
180 South Clinton Ave.
Rochester, NY 14646
Fax: (877) 774-7302
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October 9, 2009

Via Hand Delivery

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., S.W., TW-A325
Washington, DC 20554

**Re: *Informal Complaint Seeking FCC Order Barring Global Crossing from Imposing
and Collecting Unreasonable and Discriminatory USF and Cost Recovery Fee
Pass-through Surcharges***

Dear Ms. Dortch:

Azultel, Inc. ("Azultel") hereby files this erratum to its Informal Complaint against Global Crossing Telecommunications, Inc. ("Global Crossing"), filed August 10, 2009 and its Reply to Global Crossing's October 5, 2009 Initial Response, filed October 9, 2009.

In its Informal Complaint, the paragraph titled "IV. Relief Requested" should read as follows, replacing the word "international" under (1) with "interstate."

IV. Relief Requested

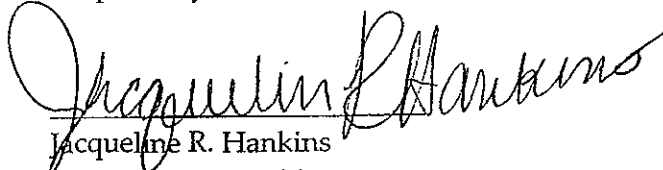
Complainant respectfully requests that the Commission order Global Crossing to comply with its rules regarding universal service. Specifically, Complainant asks that the Commission direct Global Crossing to cancel its previous invoices assessing pass-through charges based upon both Complainant's international and interstate revenue and to either (1) issue new invoices assessing pass-through USF charges on Complainant's *interstate* revenues only, in compliance with LIRE and TOPUC; or (2) acknowledge Complainant's right to elect

direct contribution, and treat Complainant as a direct contributor after it confirms that it has directly contributed to universal service.

The final paragraph in Azutел's Reply to Global Crossing's Initial Response to Informal Complaint should read as follows, replacing "international" with "interstate" under (1).

Azutел asks that the Commission direct Global Crossing to cancel its previous invoices assessing pass-through charges based upon both Azutел's international and interstate revenue and to either (1) issue new invoices assessing pass-through USF charges on Azutел's *interstate* revenues only, in compliance with LIRE and TOPUC; or (2) acknowledge Azutел's right to elect direct contribution, and treat Azutел as a direct contributor after it confirms that it has directly contributed to universal service. At a minimum, Azutел requests that the Commission direct Global Crossing to provide full and accurate responses to each of the allegations discussed in its Complaint, pursuant to its obligations under Section 1.717 of the Commission's rules. Finally, Azutел seeks Commission mediation of the dispute between the parties.

Respectfully submitted,



Jacqueline R. Hankins
Jonathan S. Marashlian
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1420 Spring Hill Road, Suite 205
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cc (via email):
Tracy Bridgham
Market Disputes Resolution Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of October, 2009, a copy of the foregoing Erratum to Azultel's Informal Complaint and Reply to Global Crossing's Initial Response to Informal Complaint was delivered via Certified Mail to the following:

Global Crossing Telecommunications, Inc.
225 Kenneth Drive
Rochester, New York 14623
Attention: Senior Vice President
North American Carrier Services
Facsimile #: (877) 774-7302

Global Crossing Telecommunications, Inc.
225 Kenneth Drive
Rochester, New York 14623
Attention: Manager Contract Administration
Facsimile #: (877) 774-7302

Michael J. Shortley, III
Vice President & Regional General Counsel
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225 Kenneth Drive
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EXHIBIT B:

Global Crossing Telecommunications, Inc.'s Amended Response to Azultel, Inc.'s Informal Complaint*

*Note: Global Crossing originally filed a brief response to Azultel's Complaint. Thereafter, the FCC directed Global Crossing to provide more complete responses to the allegations in the Complaint. In response, Global Crossing submitted the attached letter. Global Crossing's original filing and the FCC's letter requiring full responses are not included herewith.



Global Crossing

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General Counsel - North America
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November 2, 2009

BY ELECTRONIC MAIL

Tracy Bridgham, Esq.
Special Counsel
Market Disputes Resolution Division
Enforcement Bureau
Federal Communications Commission
9300 East Hampton Drive
Capitol Heights, MD 20743

***Re: Azutel, Inc. v. Global Crossing Telecommunications, Inc.,
File No. EB-09-MDIC-0027***

Dear Ms. Bridgham:

This letter responds to your letter of October 20, 2009 regarding Global Crossing's response to Azutel's informal complaint regarding Global Crossing's assessment of universal service pass-through charges on Azutel.

The letter requests Global Crossing to respond more fully to each allegation contained in Azutel's informal complaint and to indicate whether Global Crossing is willing to participate in Commission mediation of the complaint.

Addressing the latter issue first, for the reasons set forth below, Global Crossing believes that Azutel's complaint is more properly directed toward the Commission's administration of the fund rather than Global Crossing's compliance with the Form 499A Instructions (which Azutel effectively admits). Accordingly, Global Crossing respectfully declines the invitation to participate in a mediation.

Initially, Global Crossing observes that the complaint has some merit as a substantive proposition, just not as a complaint against Global Crossing. Azutel does point out significant

issues with the Commission's administration of the fund. As Global Crossing has explained,¹ under section 254(d) of the Communications Act and the Commission's regulations, every carrier is responsible for *its own contributions*. Neither the statute nor Commission regulations appoint underlying carriers as the Commission's enforcement arms with respect to their wholesale customers' compliance with their own universal service contribution obligations. Once Global Crossing determined that Azutel was a carrier, that should have been the end of the issue and whether Azutel complied with its obligations should have been a matter between the Commission and Azutel. However, the Commission's Instructions to Form 499A provide for an entirely different regime. Global Crossing has demonstrated that the Instructions impermissibly wander far beyond the statute and regulations. Nonetheless, it is a far cry to hold Global Crossing liable to a third party for its admitted compliance with those Instructions.²

That being said, although Azutel's informal complaint spans 12 single-spaced pages and Azutel's unauthorized reply comprises 5 single-spaced pages, its informal complaint reduces to the simplistic proposition that, because Azutel asserts that it is subject to an international exemption from direct contribution to the federal universal service fund, it was unreasonable for Global Crossing to report revenues that it received from Azutel as assessable and then to recover its contributions to the federal USF based upon the revenues it receives from Azutel. Complaint at 5, 6, 7, 9, 10, 11; Reply at 2, 3.

Global Crossing answered that proposition in full in its response. Under the Commission's Instructions to Form 499A, Global Crossing was required to report the revenue it received from Azutel as assessable. Global Crossing could not claim that *it* was entitled to the international exemption as far more than 12% of *Global Crossing's* revenues derive from the provision of interstate services. That *Azutel's* revenues are overwhelmingly international is irrelevant to *Global Crossing's* reporting and contribution obligations.³ Complainant makes the bald

¹ Federal-State Joint Board on Universal Service, Global Crossing Application for Review (Sept. 16, 2009) ("AFR").

² Azutel effectively admits that Global Crossing complied with the Instructions. Complaint at 10. Azutel asserts in reply that Global Crossing's position is inconsistent with its request for review of a USAC audit. Reply at 3-4. That assertion is wrong, as Azutel completely misconstrues Global Crossing's AFR. In the AFR, Global Crossing demonstrated that USAC misapplied the Instructions and, in any event, the Instructions go beyond the Commission's rules. That position is entirely consistent with Global Crossing's position here that the Commission cannot find Global Crossing in violation of section 201(b) for engaging in conduct that the Commission has expressly required (in terms of reporting) and permitted (in terms of recovery of costs).

³ Azutel's reliance on *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (D.C. Cir. 1999) is misguided. There, the Fifth Circuit addressed the FCC's then-existing requirement that predominately international carriers be required to contribute directly to the fund. *TOPUC* does not address at all the issue of whether carriers such as Global Crossing must report revenue from such carriers – which comprise a small part of *Global Crossing's* revenue – as assessable. The Instructions unequivocally require Global Crossing to so report such revenues as assessable. See 2009 Instructions, Figure 1 (Table to determine if a filer meets the *de minimis* standard for purposes of universal service contributions); at 5 ("[t]hese non-contributors *must be treated as end users by their underlying carriers* and therefore may end up contributing indirectly as a result of pass-through charges.") (emphasis added). Azutel's challenge is more properly directed to the Commission's *administration* of the fund, and not to Global Crossing's compliance with the Commission's Instructions.

assertion that the underlying carrier had an obligation effectively to claim the exemption on behalf its customers. Not surprisingly, Azutел offers not a shred of support for this unique proposition.⁴

Similarly, the fact that this results in Azutел being assessed by Global Crossing for USF recovery in excess of its interstate revenues is simply a function of the manner in which the instructions require *Global Crossing* to report revenues. If the Commission believes that this result is unfair, it should correct the perceived inequity.

In addition, because Global Crossing was required to report the revenue from Azutел as assessable, it was permitted to recover those costs from its customer, in this case, Azutел.⁵ Such action cannot form the basis for a finding of a violation of section 201(b) of the Act. If the Commission disagrees, Global Crossing is anxious for the Commission to explain that conclusion. If the Commission agrees, Global Crossing respectfully requests that the Commission so state.⁶

Azutел's complaint in essence reduces to the economic proposition that it is unfair that its "indirect" USF contributions exceed its interstate revenues. That may well be, but that is the result of the Commission's own regime. Indeed, the Instructions expressly contemplate this result.⁷ If, in that event, the Commission believes that the result is inequitable, then the Commission should address that issue in a rule making and not in response to informal complaints.

Similarly, the Commission's international exemption (47 CFR § 54.706(c)) only addresses an entity's *contributions*. It does not, by its terms, address a carrier's recovery of its contributions from its customers, the circumstance at issue in this matter. Azutел's assertion that "[n]either the FCC's rules nor the courts differentiate between direct and indirect contributions" (Complaint at 5) is, simply put, wrong. In fact, the Commission has made clear that the obligations of underlying carriers and resellers are independent of each other. See *American Telecommunications Systems, Inc.*, Order, 22 FCC Rcd. 5009, 5012 (Wireline Comp. Bur. 2007), *app. for review pending*; *American Cyber Corp.*, Order, 22 FCC Rcd. 4925, 4929-30 (Wireline Comp. Bur. 2007), *app. for review pending*.

⁴ Azutел simply invents obligations on the part of wholesale carriers. It asserts, in this regard, "wholesale carriers must conduct due diligence and thoroughly review all available information relevant to a carrier's classification." Complaint at 5. Again, Azutел points to no support for this singularly inaccurate assertion. Such a proposition would put underlying carriers in a "Head's USAC wins, Tails, the carrier loses proposition." USAC has already faulted Global Crossing (in an audit that is wrong for a whole variety of reasons, but not this one) for not mechanistically applying instructions that had not even been adopted at the time. See AFR at 14-17. The *Instructions* may be wrong (and indeed they are). However, a carrier's compliance with those instructions cannot expose it to liability. Any decision to the contrary would be the height of irrational agency decision-making.

⁵ See 47 C.F.R. § 54.712; *Federal-State Joint Board on Universal Service, Report and Order*, 17 FCC Rcd. 24952 at ¶¶ 2, 55 (2002).

⁶ Azutел asserts in its reply that it claimed in its informal complaint that Global Crossing's Cost Recovery Fee ("CRF") is unreasonable. Reply at 4. It actually did no such thing in its complaint. Moreover, the CRF is designed to recover far more than Global Crossing's TRS, LNP and NANPA contributions.

⁷ See *supra* at 2 n.3.

Global Crossing believes that it has fully addressed each substantive, non-repetitive point contained in the informal complaint. If the Division believes that there are specific issues that require further discussion, Global Crossing requests that the Division specifically identify those issues and Global Crossing would be pleased to provide further responses. The Commission, however, should inform complainant that the informal complaint is without merit and advise complainant of its alternatives under section 1.718 of the Commission's rules.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Mr. J. Shank" followed by a stylized flourish.

cc: Jacqueline R. Hankins, Esq.
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